

Message Text

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ORIGIN OES-06

INFO OCT-01 ARA-10 ISO-00 ACDA-10 AGRE-00 AID-05 CEA-01

CEQ-01 CG-00 CIAE-00 CIEP-02 COME-00 DLOS-06 DODE-00

DOT-00 EB-07 EPA-04 ERDA-07 FMC-02 TRSE-00 H-02

INR-07 INT-05 IO-13 JUSE-00 L-03 NSAE-00 NSC-05

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APPROVED BY OES/OFA/FA:KCLARK-BOURNE

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P R 021449Z NOV 76

FM SECSTATE WASHDC

TO AMEMBASSY BRASILIA PRIORITY

INFO AMCONSUL BELEM

UNCLAS STATE 269399

E.O. 11652: N/A

TAGS: EFIS, BR

SUBJECT: EMBARGO PROVISIONS OF FISHERY CONSERVATION
AND MANAGEMENT ACT

REF: BRASILIA 08812

1. FOLLOWING IS LEGAL ANALYSIS REQUESTED BY EMBASSY
OF EMBARGO PROVISIONS OF FISHERY CONSERVATION AND
MANAGEMENT ACT AND OTHER LEGISLATION WHICH MAY COME INTO
PLAY AS A RESULT OF FAILURE TO REACH AGREEMENT,
SEIZURES IN THE ABSENCE OF AN AGREEMENT, AND SEIZURES
IN THE CONTEXT OF AN AGREEMENT.

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2. FAILURE TO REACH AGREEMENT:

SECTION 205(A) OF THE FISHERIES CONSERVATION AND
MANAGEMENT ACT OF 1976 (QUOTE THE ACT UNQUOTE) REQUIRES

THE IMPOSITION OF A PROHIBITION OF IMPORTS ON CERTAIN
FISH PRODUCTS FROM A FOREIGN NATION:

QUOTE IF THE SECRETARY OF STATE DETERMINES THAT...

(1) HE HAS BEEN UNABLE, WITHIN A REASONABLE PERIOD OF
TIME, TO CONCLUDE WITH ANY FOREIGN NATION AN INTERNATIONAL
FISHERY AGREEMENT ALLOWING FISHING VESSELS OF THE U.S.
EQUITABLE ACCESS TO FISHERIES OVER WHICH THAT NATION EXERTS

EXCLUSIVE AUTHORITY AS RECOGNIZED BY THE U.S., IN
ACCORDANCE WITH TRADITIONAL FISHING ACTIVITIES OF SUCH
VESSELS, IF ANY, AND UNDER TERMS NOT MORE RESTRICTIVE
THAN THOSE ESTABLISHED UNDER SECTIONS 201(C) AND (D)
AND 204(B) (7) AND (10), BECAUSE SUCH NATION HAS
(A) REFUSED TO COMMENCE NEGOTIATIONS OR (B) FAILS TO
NEGOTIATE IN GOOD FAITH. UNQUOTE.

THE CROSS-REFERENCE HERE TO SEC. 201(D), WHICH ES-
TABLISHES THE STANDARD FOR THE TOTAL ALLOWABLE LEVEL
OF FOREIGN FISHING OFF THE U.S. COAST AS THAT PORTION
OF THE OPTIMUM YIELD FOR A SPECIFIC FISH THAT WOULD
NOT BE HARVESTED BY VESSELS OF THE U.S., SUGGESTS THAT
TRADITIONAL FISHING ACTIVITIES OF THE U.S. OFF THE
BRAZILIAN COAST NEED ONLY BE TAKEN INTO ACCOUNT TO THE
EXTENT THAT THERE IS A SURPLUS ABOVE THE HARVESTING
CAPACITY OF BRAZILIAN VESSELS.

IF BRAZIL ACCEPTS THE PRINCIPLE OF ALLOWING FOREIGN
VESSELS TO FISH IF THERE IS A SURPLUS, AND IS ABLE TO
REASONABLY JUSTIFY THE FIGURES IT USES IN DETERMINING
SUCH SURPLUS--EVEN IF WE FOUND THEM UNSUPPORTABLE--
IT WOULD BE DIFFICULT TO ASSERT THAT BRAZIL WAS NOT
NEGOTIATING IN GOOD FAITH ON THIS BASIS. THEREFORE,
A FAILURE TO REACH AGREEMENT WITH BRAZIL ON SHRIMP
WOULD NOT BRING INTO PLAY SECTION 205(A)(1) IF NEGO-
TIATIONS HAD COMMENCED, BRAZIL WAS PREPARED TO ALLOW U.S.
VESSELS TO FISH ANY SURPLUS AND THE NEGOTIATIONS PRO-
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CEDED IN GOOD FAITH.

3. FISHING VESSEL SEIZURES:

SECTION 205(A)(4) REQUIRES AN IMPORT PROHIBITION:

IF THE SECRETARY OF STATE DETERMINES THAT...QUOTE
ANY FISHING VESSEL OF THE U.S., WHILE FISHING
IN WATERS BEYOND ANY FOREIGN NATION'S TERRITORIAL SEA,
TO THE EXTENT THAT SUCH SEA IS RECOGNIZED BY THE U.S.,
IS SEIZED BY ANY FOREIGN NATION

(A) IN VIOLATION OF AN APPLICABLE INTERNATIONAL

FISHERY AGREEMENT;

(B) WITHOUT AUTHORIZATION UNDER AN AGREEMENT BETWEEN
THE U.S. AND SUCH NATION; OR

(C) AS A CONSEQUENCE OF A CLAIM OF JURISDICTION WHICH

IS NOT RECOGNIZED BY THE UNITED STATES. UNQUOTE.

OBTAININGLY, SUBPARA B OF THIS SECTION AUTHORIZES AN
EMBARGO IF THE GOB VIOLATES A SHRIMP AGREEMENT REACHED
WITH IT. MORE DIFFICULT IS THE QUESTION OF WHETHER,
SHOULD THERE BE NO AGREEMENT BETWEEN THE U.S. AND
BRAZIL CONCERNING SHRIMP AND U.S. SHRIMP VESSELS FISHING
IN THE BRAZILIAN ZONE ARE SEIZED, AN IMPORT PROHIBITION
MUST BE APPLIED BY VIRTUE OF THE ACT.

THE NARROW LEGAL ISSUE IS WHETHER SUBPARA B APPLIES ONLY
WHERE THERE IS AN AGREEMENT THAT DOES NOT AUTHORIZE THE
SEIZURE, OR ALSO WHERE THERE IS NO AGREEMENT AND THE
SEIZURE OCCURS. IN THE LATTER CASE, BRAZIL WOULD BE
ENFORCING A JURISDICTION THAT IS EITHER RECOGNIZED BY THE
U.S. OR NOT. IF IT IS NOT RECOGNIZED BY THE U.S., HOWEVER,
THE SEIZURE WOULD BRING INTO PLAY SUBPARA C. SUBPARA B
SHOULD HAVE A DIFFERENT MEANING; AND SINCE SUBPARA C
SUGGESTS BY IMPLICATION THAT CONGRESS REGARDED A SEIZURE
OF A FISHING VESSEL AS A CONSEQUENCE OF A CLAIM OF JURIS-
DICTION WHICH IS RECOGNIZED BY THE U.S. TO BE LEGITIMATE,
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WHETHER OR NOT AN AGREEMENT IS IN PLACE, IT WOULD APPEAR
TO MAKE SENSE TO CONSTRUCT SUBPARA B AS COMING INTO PLAY
ONLY WHERE THERE IS FISHERIES JURISDICTION RECOGNIZED
BY THE U.S., AN AGREEMENT IS IN PLACE, AND A VESSEL IS
SEIZED WITHOUT AUTHORIZATION UNDER IT. THIS WOULD AVOID
THE IMPOSITION OF SANCTIONS ON NATIONS THAT BEHAVE AS WE
WOULD IN THIS REGARD OFF OUR OWN COASTS.

ONE PROBLEM WHICH WILL ARISE UNDER THE ABOVE INTERPRE-
TATION WITH BRAZIL IN THIS CONNECTION IS DETERMINING
WHETHER BRAZIL'S ENFORCEMENT ACTION WITH REGARD TO
SHRIMP EMANATES FROM A TERRITORIAL SEA CLAIM WHICH WE
WOULD NOT RECOGNIZE, OR FROM A CLAIM OF FISHERY JURISDIC-
TION OVER SHRIMP WHICH IS SOMEHOW DISTINGUISHED FROM THE
TERRITORIAL SEA CLAIM. PRESUMABLY, IF THE GOB'S
ENFORCEMENT ACTIVITY AND REGULATIONS WITH RESPECT
TO SHRIMP ARE COMPARABLE TO THE ACTIONS THE USG WOULD
TAKE WITH RESPECT TO COASTAL FISHERIES, WE WOULD NOT TAKE
THE VIEW THAT BRAZIL WAS ACTING ON THE BASIS OF A
CLAIM WE DO NOT RECOGNIZE--THEREBY TRIGGERING 4(C).

THE ALTERNATIVE INTERPRETATION OF SECTION 205(A)(4)(B)

IS ONE WHICH REQUIRES THE IMPOSITION OF AN IMPORT PROHIBITION WHENEVER THERE IS A SEIZURE, AND NO AGREEMENT IS IN PLACE THAT AUTHORIZES IT. THIS WOULD LEAD TO TWO ANOMALIES. FIRST, IN A CASE WHERE A U.S. VESSEL IS FISHING

OFF THE COAST OF BRAZIL AND IS SEIZED, BUT NO AGREEMENT HAS EVEN BEEN PROPOSED BETWEEN THE TWO GOVERNMENTS, IT WOULD MAKE NO SENSE TO IMPOSE A SANCTION ON BRAZIL FOR EXERCISING FISHERY JURISDICTION RECOGNIZED BY THE U.S. SECOND, IF AN AGREEMENT HAD BEEN PROPOSED, BUT NOT CONCLUDED FOR REASONS OTHER THAN A REFUSAL TO BEGIN NEGOTIATIONS BY BRAZIL OR FAILURE TO NEGOTIATE IN GOOD FAITH BY BRAZIL, SO THAT SECTION 205(A)(1) DID NOT COME INTO PLAY, IT WOULD BE UNREASONABLE TO IMPOSE A SANCTION WHERE THE GOB UNDERTAKES WHAT WE WOULD CONSIDER LEGITIMATE ENFORCEMENT ACTION IN AN AREA SUBJECT TO THE GOB'S FISHERY JURISDICTION. IN OTHER WORDS, SECTION 205(A)(1) REFLECTS A POLICY OF IMPOSING SANCTIONS WHERE AGREEMENTS ARE NOT REACHED ONLY WHERE THERE IS BAD FAITH

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ON THE OTHER SIDE. TO IMPOSE SANCTIONS AS A RESULT OF SEIZURES RESULTING FROM FISHERY JURISDICTION WE RECOGNIZE WHERE NO AGREEMENT WAS REACHED UNDER CIRCUMSTANCES INVOLVING GOOD FAITH WOULD UNDERCUT THE POLICY OF THAT PARAGRAPH. THE ALTERNATIVE IS A MOST UNREASONABLE RESULT--CONSTRUE THE SECTION TO REQUIRE IMPORT PROHIBITIONS IN ANY CASE WHERE THE FOREIGN NATION DID NOT AGREE TO WHAT THE U.S. WANTED. IT ALSO FAILS TO TAKE INTO ACCOUNT THE PRINCIPLES THAT WILL BE APPLIED BY THE U.S. OFF ITS OWN COAST.

4. SECTION 4(B) OF THE FOREIGN MILITARY SALES ACT, AS AMENDED, PROVIDES AS FOLLOWS:

QUOTE NO SALES, CREDITS, OR GUARANTIES SHALL BE MADE OR EXTENDED UNDER THIS ACT TO ANY COUNTRY DURING A PERIOD OF ONE YEAR AFTER SUCH COUNTRY SEIZES, OR TAKES INTO CUSTODY, OR FINES AN AMERICAN FISHING VESSEL FOR ENGAGING IN FISHING MORE THAN TWELVE MILES FROM THE COAST OF THAT COUNTRY. UNQUOTE.

THE IMPOSITION OF THIS SANCTION NOW AS IF THE EXTENSION OF OUR OWN FISHERY JURISDICTION BEYOND TWELVE MILES NEVER OCCURRED WOULD SEEM UNREASONABLE. WHILE THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976 CONTAINS AMENDMENTS TO SEVERAL STATUTES THAT REFER TO A TWELVE MILE FISHERY JURISDICTION, THIS SECTION OF THE FMSA WAS LEFT UNCHANGED AND NEVER REFERRED TO IN THE FLOOR DEBATES OR COMMITTEE REPORTS. WE WILL BE BRINGING THIS POINT TO THE ATTENTION OF CONGRESS. SINCE THIS PROVISION WAS ENACTED WHEN THE U.S. DID NOT RECOGNIZE CLAIMS TO

FISHERY JURISDICTION BEYOND TWELVE MILES, IT WOULD SEEM REASONABLE TO CONSTRUE SECTION 4(B) OF THE FMSA TO

APPLY ONLY WHERE THERE IS A SEIZURE OF U.S. FISHING VESSELS AS A CONSEQUENCE OF A CLAIM OF JURISDICTION NOT RECOGNIZED BY THE U.S. HOWEVER, THIS DOES NOT REALLY ANSWER THE QUESTION WITH RESPECT TO BRAZIL SINCE THE QUESTION WILL ALWAYS ARISE AS TO WHETHER THE GOB IS ENFORCING A TERRITORIAL SEA CLAIM OR A LEGITIMATE CLAIM TO FISHERY JURISDICTION. CERTAINLY THE MORE UNCLASSIFIED

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REASONABLE INTERPRETATION OF THE FMSA IS TO SAY THAT IF A SEIZURE OCCURS WHICH TRIGGERS THE EMBARGO PROVISIONS OF THE FISHERY CONSERVATION AND MANAGEMENT ACT, THEN THE FMSA SHOULD ALSO BE TRIGGERED. HOWEVER, EMBASSY SHOULD NOTE THAT CONGRESSIONAL INTENT OR PURPOSE IN THIS REGARD IS NOT CLEAR, AND WHAT THE EVENTUAL INTERPRETATION OR AMENDMENT OF THE FMSA WILL BE IS OPEN TO QUESTION.

5. FISHERY CONSERVATION AND MANAGMENT ACT ALSO AMENDED CERTAIN SECTIONS OF FISHERMANS PROTECTIVE ACT. THE AMENDED SECTIONS BASICALLY BROADEN THE SCOPE OF THE RATIONALES A USG FISHERMAN CAN USE FOR MAKING A CLAIM FOR REIMBURSEMENT IF HIS VESSEL HAS BEEN SEIZED. SECTION 5 OF THE FPA REMAINS AS BEFORE. IT REQUIRES NOTIFICATION OF A FOREIGN COUNTRY FOR ANY REIMBURSEMENT THAT HAS BEEN MADE BY USG TO ITS FISHERMEN AND A REQUEST OF THE FOREIGN GOVERNMENT TO REIMBURSE THE USG. IF THE FOREIGN GOVERNMENT DOES NOT MAKE SUCH REIMBURSEMENT, THE FPA PROVIDES THAT FOREIGN ASSISTANCE FUNDS OF EQUAL AMOUNT OF CLAIM SHALL BE TRANSFERRED TO MEET THE CLAIM UNLESS THE PRESIDENT CERTIFIES THAT SUCH TRANSFER IS NOT IN THE NATIONAL INTEREST IN THE PARTICULAR INSTANCE. CONSEQUENTLY, UNDER NEW AMENDMENTS TO FPA, POTENTIAL FOR FOREIGN ASSISTANCE FUNDS BEING TRANSFERRED AS A RESULT OF SEIZURES OF U.S. FISHING VESSELS IS HEIGHTENED SINCE RATIONALES FOR MAKING SUCH CLAIMS HAVE BEEN BROADENED.

6. DEPARTMENT HOPES ABOVE ANALYSIS WILL PROVE USEFUL TO EMBASSY AS WE MOVE INTO NEW PHASE OF US-BRAZIL SHRIMPING ACTIVITIES. KISSINGER

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INFO OCT-01 ISO-00 /011 R

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DRAFTED BY: ARA/LA:JFKEANE

APPROVED BY: ARA/LA:JFKEANE

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R 082340Z NOV 76

FM SECSTATE WASHDC

TO AMEMBASSY BUENOS AIRES

AMEMBASSY LIMA

AMEMBASSY MEXICO

AMEMBASSY PANAMA

AMEMBASSY QUITO

AMEMBASSY SANTIAG

UNCLAS STATE 269399

THE FOLLOWING REPEAT STATE 269399 SENT ACTION BRASILIA

INFO BELEM 02 NOV 76

QUOTE UNCLAS STATE 269399

E.O. 11652: N/A

TAGS: EFIS, BR

SUBJECT: EMBARGO PROVISIONS OF FISHERY CONSERVATION

AND MANAGEMENT ACT

REF: BRASILIA 08812

1. FOLLOWING IS LEGAL ANALYSIS REQUESTED BY EMBASSY
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2. FAILURE TO REACH AGREEMENT:

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SECTION 205(A) OF THE FISHERIES CONSERVATION AND
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QUOTE IF THE SECRETARY OF STATE DETERMINES THAT...

(1) HE HAS BEEN UNABLE, WITHIN A REASONABLE PERIOD OF
TIME, TO CONCLUDE WITH ANY FOREIGN NATION AN INTERNATIONAL
FISHERY AGREEMENT ALLOWIN FISHING VESSELS OF THE U.S.
EQUITABLE ACCESS TO FISHERIES OVER WHICH THAT NATION EXERTS

EXCLUSIVE AUTHORITY AS RECOGNIZED BY THE U.S., IN

ACCORDANCE WITH TRADITIONAL FISHING ACTIVITIES OF SUCH VESSELS, IF ANY, AND UNDER TERMS NOT MORE RESTRICTIVE THAN THOSE ESTABLISHED UNDER SECTIONS 201(C) AND (D) AND 204(B) (7) AND (10), BECAUSE SUCH NATION HAS (A) REFUSED TO COMMENCE NEGOTIATIONS OR (B) FAILS TO NEGOTIATE IN GOOD FAITH. UNQUOTE.

THE CROSS-REFERENCE HERE TO SEC. 201(D), WHICH ESTABLISHES THE STANDARD FOR THE TOTAL ALLOWABLE LEVEL OF FOREIGN FISHING OFF THE U.S. COAST AS THAT PORTION OF THE OPTIMUM YIELD FOR A SPECIFIC FISH THAT WOULD NOT BE HARVESTED BY VESSELS OF THE U.S., SUGGESTS THAT TRADITIONAL FISHING ACTIVITIES OF THE U.S. OFF THE BRAZILIAN COAST NEED ONLY BE TAKEN INTO ACCOUNT TO THE EXTENT THAT THERE IS A SURPLUS ABOVE THE HARVESTING CAPACITY OF BRAZILIAN VESSELS.

IF BRAZIL ACCEPTS THE PRINCIPLE OF ALLOWING FOREIGN VESSELS TO FISH IF THERE IS A SURPLUS, AND IS ABLE TO REASONABLY JUSTIFY THE FIGURES IT USES IN DETERMINING SUCH SURPLUS--EVEN IF WE FOUND THEM UNSUPPORTABLE--IT WOULD BE DIFFICULT TO ASSERT THAT BRAZIL WAS NOT NEGOTIATING IN GOOD FAITH ON THIS BASIS. THEREFORE, A FAILURE TO REACH AGREEMENT WITH BRAZIL ON SHRIMP WOULD NOT BRING INTO PLAY SECTION 205(A)(1) IF NEGOTIATIONS HAD COMMENCED, BRAZIL WAS PREPARED TO ALLOW U.S. VESSELS TO FISH ANY SURPLUS AND THE NEGOTIATIONS PROCEEDED IN GOOD FAITH.

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3. FISHING VESSEL SEIZURES:

SECTION 205(A)(4) REQUIRES AN IMPORT PROHIBITION:

IF THE SECRETARY OF STATE DETERMINES THAT...QUOTE ANY FISHING VESSEL OF THE U.S., WHILE FISHING IN WATERS BEYOND ANY FOREIGN NATION'S TERRITORIAL SEA, TO THE EXTENT THAT SUCH SEA IS RECOGNIZED BY THE U.S., IS SEIZED BY ANY FOREIGN NATION

(A) IN VIOLATION OF AN APPLICABLE INTERNATIONAL FISHERY AGREEMENT;

(B) WITHOUT AUTHORIZATION UNDER AN AGREEMENT BETWEEN THE U.S. AND SUCH NATION; OR

(C) AS A CONSEQUENCE OF A CLAIM OF JURISDICTION WHICH

IS NOT RECOGNIZED BY THE UNITED STATES. UNQUOTE.

OBVIOUSLY, SUBPARA B OF THIS SECTION AUTHORIZES AN EMBARGO IF THE GOB VIOLATES A SHRIMP AGREEMENT REACHED

WITH IT. MORE DIFFICULT IS THE QUESTION OF WHETHER, SHOULD THERE BE NO AGREEMENT BETWEEN THE U.S. AND BRAZIL CONCERNING SHRIMP AND U.S. SHRIMP VESSELS FISHING IN THE BRAZILIAN ZONE ARE SEIZED, AN IMPORT PROHIBITION MUST BE APPLIED BY VIRTUE OF THE ACT.

THE NARROW LEGAL ISSUE IS WHETHER SUBPARA B APPLIES ONLY WHERE THERE IS AN AGREEMENT THAT DOES NOT AUTHORIZE THE SEIZURE, OR ALSO WHERE THERE IS NO AGREEMENT AND THE SEIZURE OCCURS. IN THE LATTER CASE, BRAZIL WOULD BE ENFORCING A JURISDICTION THAT IS EITHER RECOGNIZED BY THE U.S. OR NOT. IF IT IS NOT RECOGNIZED BY THE U.S., HOWEVER, THE SEIZURE WOULD BRING INTO PLAY SUBPARA C. SUBPARA B SHOULD HAVE A DIFFERENT MEANING; AND SINCE SUBPARA C SUGGESTS BY IMPLICATION THAT CONGRESS REGARDED A SEIZURE OF A FISHING VESSEL AS A CONSEQUENCE OF A CLAIM OF JURISDICTION WHICH IS RECOGNIZED BY THE U.S. TO BE LEGITIMATE, WHETHER OR NOT AN AGREEMENT IS IN PLACE, IT WOULD APPEAR UNCLASSIFIED

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TO MAKE SENSE TO CONSTRUE SUBPARA B AS COMING INTO PLAY ONLY WHERE THERE IS FISHERIES JURISDICTION RECOGNIZED BY THE U.S., AN AGREEMENT IS IN PLACE, AND A VESSEL IS SEIZED WITHOUT AUTHORIZATION UNDER IT. THIS WOULD AVOID THE IMPOSITION OF SANCTIONS ON NATIONS THAT BEHAVE AS WE WOULD IN THIS REGARD OFF OUR OWN COASTS.

ONE PROBLEM WHICH WILL ARISE UNDER THE ABOVE INTERPRETATION WITH BRAZIL IN THIS CONNECTION IS DETERMINING WHETHER BRAZIL'S ENFORCEMENT ACTION WITH REGARD TO SHRIMP EMANATES FROM A TERRITORIAL SEA CLAIM WHICH WE WOULD NOT RECOGNIZE, OR FROM A CLAIM OF FISHERY JURISDICTION OVER SHRIMP WHICH IS SOMEHOW DISTINGUISHED FROM THE TERRITORIAL SEA CLAIM. PRESUMABLY, IF THE GOB'S ENFORCEMENT ACTIVITY AND REGULATIONS WITH RESPECT TO SHRIMP ARE COMPARABLE TO THE ACTIONS THE USG WOULD TAKE WITH RESPECT TO COASTAL FISHERIES, WE WOULD NOT TAKE THE VIEW THAT BRAZIL WAS ACTING ON THE BASIS OF A CLAIM WE DO NOT RECOGNIZE--THEREBY TRIGGERING 4(C).

THE ALTERNATIVE INTERPRETATION OF SECTION 205(A)(4)(B) IS ONE WHICH REQUIRES THE IMPOSITION OF AN IMPORT PROHIBITION WHENEVER THERE IS A SEIZURE, AND NO AGREEMENT IS IN PLACE THAT AUTHORIZES IT. THIS WOULD LEAD TO TWO ANOMALIES. FIRST, IN A CASE WHERE A U.S. VESSEL IS FISHING

OFF THE COAST OF BRAZIL AND IS SEIZED, BUT NO AGREEMENT HAS EVEN BEEN PROPOSED BETWEEN THE TWO GOVERNMENTS, IT WOULD MAKE NO SENSE TO IMPOSE A SANCTION ON BRAZIL FOR EXERCISING FISHERY JURISDICTION RECOGNIZED BY THE U.S. SECOND, IF AN AGREEMENT HAD BEEN PROPOSED, BUT NOT CONCLUDED FOR REASONS OTHER THAN A REFUSAL TO BEGIN NEGOTI-

TIATIONS BY BRAZIL OR FAILURE TO NEGOTIATE IN GOOD FAITH BY BRAZIL, SO THAT SECTION 205(A)(1) DID NOT COME INTO PLAY, IT WOULD BE UNREASONABLE TO IMPOSE A SANCTION WHERE THE GOB UNDERTAKES WHAT WE WOULD CONSIDER LEGITIMATE ENFORCEMENT ACTION IN AN AREA SUBJECT TO THE GOB'S FISHERY JURISDICTION. IN OTHER WORDS, SECTION 205(A)(1) REFLECTS A POLICY OF IMPOSING SANCTIONS WHERE AGREEMENTS ARE NOT REACHED ONLY WHERE THERE IS BAD FAITH ON THE OTHER SIDE. TO IMPOSE SANCTIONS AS A RESULT OF UNCLASSIFIED

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SEIZURES RESULTING FROM FISHERY JURISDICTION WE RECOGNIZE WHERE NO AGREEMENT WAS REACHED UNDER CIRCUMSTANCES INVOLVING GOOD FAITH WOULD UNDERCUT THE POLICY OF THAT PARAGRAPH. THE ALTERNATIVE IS A MOST UNREASONABLE RESULT--CONSTRUE THE SECTION TO REQUIRE IMPORT PROHIBITIONS IN ANY CASE WHERE THE FOREIGN NATION DID NOT AGREE TO WHAT THE U.S. WANTED. IT ALSO FAILS TO TAKE INTO ACCOUNT THE PRINCIPLES THAT WILL BE APPLIED BY THE U.S. OFF ITS OWN COAST.

4. SECTION 4(B) OF THE FOREIGN MILITARY SALES ACT, AS AMENDED, PROVIDES AS FOLLOWS:

QUOTE NO SALES, CREDITS, OR GUARANTIES SHALL BE MADE OR EXTENDED UNDER THIS ACT TO ANY COUNTRY DURING A PERIOD OF ONE YEAR AFTER SUCH COUNTRY SEIZES, OR TAKES INTO CUSTODY, OR FINES AN AMERICAN FISHING VESSEL FOR ENGAGING IN FISHING MORE THAN TWELVE MILES FROM THE COAST OF THAT COUNTRY. UNQUOTE.

THE IMPOSITION OF THIS SANCTION NOW AS IF THE EXTENSION OF OUR OWN FISHERY JURISDICTION BEYOND TWELVE MILES NEVER OCCURRED WOULD SEEM UNREASONABLE. WHILE THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976 CONTAINS AMENDMENTS TO SEVERAL STATUTES THAT REFER TO A TWELVE MILE FISHERY JURISDICTION, THIS SECTION OF THE FMSA WAS LEFT UNCHANGED AND NEVER REFERRED TO IN THE FLOOR DEBATES OR COMMITTEE REPORTS. WE WILL BE BRINGING THIS POINT TO THE ATTENTION OF CONGRESS. SINCE THIS PROVISION WAS ENACTED WHEN THE U.S. DID NOT RECOGNIZE CLAIMS TO FISHERY JURISDICTION BEYOND TWELVE MILES, IT WOULD SEEM REASONABLE TO CONSTRUE SECTION 4(B) OF THE FMSA TO

APPLY ONLY WHERE THERE IS A SEIZURE OF U.S. FISHING VESSELS AS A CONSEQUENCE OF A CLAIM OF JURISDICTION NOT RECOGNIZED BY THE U.S. HOWEVER, THIS DOES NOT REALLY ANSWER THE QUESTION WITH RESPECT TO BRAZIL SINCE THE QUESTION WILL ALWAYS ARISE AS TO WHETHER THE GOB IS ENFORCING A TERRITORIAL SEA CLAIM OR A LEGITIMATE CLAIM TO FISHERY JURISDICTION. CERTAINLY THE MORE REASONABLE INTERPRETATION OF THE FMSA IS TO SAY THAT

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IF A SEIZURE OCCURS WHICH TRIGGERS THE EMBARGO PROVISIONS OF THE FISHERY CONSERVATION AND MANAGEMENT ACT, THEN THE FMSA SHOULD ALSO BE TRIGGERED. HOWEVER, EMBASSY SHOULD NOTE THAT CONGRESSIONAL INTENT OR PURPOSE IN THIS REGARD IS NOT CLEAR, AND WHAT THE EVENTUAL INTERPRETATION OR AMENDMENT OF THE FMSA WILL BE IS OPEN TO QUESTION.

5. FISHERY CONSERVATION AND MANAGMENT ACT ALSO AMENDED CERTAIN SECTIONS OF FISHERMANS PROTECTIVE ACT. THE AMENDED SECTIONS BASICALLY BROADEN THE SCOPE OF THE RATIONALES A USG FISHERMAN CAN USE FOR MAKING A CLAIM FOR REIMBURSEMENT IF HIS VESSEL HAS BEEN SEIZED. SECTION 5 OF THE FPA REMAINS AS BEFORE. IT REQUIRES NOTIFICATION OF A FOREIGN COUNTRY FOR ANY REIMBURSEMENT THAT HAS BEEN MADE BY USG TO ITS FISHERMEN AND A REQUEST OF THE FOREIGN GOVERNMENT TO REIMBURSE THE USG. IF THE FOREIGN GOVERNMENT DOES NOT MAKE SUCH REIMBURSEMENT, THE FPA PROVIDES THAT FOREIGN ASSISTANCE FUNDS OF EQUAL AMOUNT OF CLAIM SHALL BE TRANSFERRED TO MEET THE CLAIM UNLESS THE PRESIDENT CERTIFIES THAT SUCH TRANSFER IS NOT IN THE NATIONAL INTEREST IN THE PARTICULAR INSTANCE. CONSEQUENTLY, UNDER NEW AMENDMENTS TO FPA, POTENTIAL FOR FOREIGN ASSISTANCE FUNDS BEING TRANSFERRED AS A RESULT OF SEIZURES OF U.S. FISHING VESSELS IS HEIGHTENED SINCE RATIONALES FOR MAKING SUCH CLAIMS HAVE BEEN BROADENED.

6. DEPARTMENT HOPES ABOVE ANALYSIS WILL PROVE USEFUL TO EMBASSY AS WE MOVE INTO NEW PHASE OF US-BRAZIL SHRIMPING ACTIVITIES.

UNQUOTE KISSINGER

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Disposition Event:
Disposition History: n/a
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Disposition Remarks:
Document Number: 1976STATE269399
Document Source: ADS
Document Unique ID: 00
Drafter: OES/OFA/FA:DCOLSON:SMD
Enclosure: n/a
Executive Order: N/A
Errors: n/a
Film Number: D760408-1066
From: STATE
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1976/newtext/t197611100/baaaeqpb.tel
Line Count: 525
Locator: TEXT ON-LINE, TEXT ON MICROFILM
Office: ORIGIN OES
Original Classification: UNCLASSIFIED
Original Handling Restrictions: n/a
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Review Comment: n/a
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Review Exemptions: n/a
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Margaret P. Grafeld
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04 MAY 2006

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Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: EMBARGO PROVISIONS OF FISHERY CONSERVATION
TAGS: EFIS, BR
To: BRASILIA INFO BELEM
Type: TE
Markings: Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 04 MAY 2006